IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1089

DR. MILTON MARGOLES, M.D.,

Petitioner,

vs.

ALIDA JOHNS and THE JOURNAL COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner seeks a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A., p. 3a) is unreported. The opinions of the district court appear in Appen-

dix A. at pp. 12a and 18a.

JURISDICTION

The judgment of the court of appeals (App. A., p. 3a) was entered on Oct. 14, 1976. A timely petition for rehearing was denied on Nov. 16, 1976. (App. A., p. 12a.) The jurisdiction of this Court is invoked under 28 U.S.C. S. 1254 (1).

QUESTIONS PRESENTED

Six weeks *AFTER* the plaintiff *FULLY*, although tardily, had complied with an order to complete production of documents, the district court dismissed his slander case for wilful disobedience of its discovery order. With their motion to dismiss, the defendants claimed that noncompliance had been conscious and intentional because both the plaintiff and his son (to whom the remaining documents belonged) had been present when the deadline was agreed upon. The plaintiff's explanation is that the delay occurred under circumstances of unexpected serious illness, hospitalization and surgery at the Mayo Clinic, Rochester, Minn., and personal adversity; that prior to the discovery deadline, counsel[1] had told plaintiff's

1. "Plaintiff's counsel," as used throughout this petition, refers to Atty. Wayne B. Giampietro exclusively. Although an attorney, Perry Margoles did not act as counsel in this case until filing the petition for a rehearing before the court of appeals.

son he was conveying their requests to the court for a rescheduling of proceedings (which he did not do); and that one month of the two-month tardiness in completing production of documents was due--not to any wilfulness on the plaintiff's part--but entirely to counsel's unavailability to review and deliver the documents sooner to the defendants' attorneys.

1. Whether, under Fed. R. Civ. P. 37 9B) (2) (C), *Societe Internationale v. Rogers, 356 U.S. 197 (1958)*, and *National Hockey League v. Metropolitan Hockey Club, 49 L. Ed. 2d 747 (1976)*, it is an abuse of discretion for a district court to dismiss a case for wilful disobedience of a discovery order notwithstanding *PRIOR* full compliance, and where severe personal hardship and illness caused the compliance to occur after a first discovery deadline.

2. Whether it is an abuse of discretion for a district court considering, for the first time in a case, Rule 37 sanctions for discovery noncompliance, to dismiss a com-

plaint instead of using less extreme *INITIAL* steps which would be just as effective to accomplish discovery.

3. Whether a plaintiff asking a district court, under Fed. R. Civ. P. 60 (b) to vacate a judgment of a Rule 37 dismissal of a complaint, should be afforded a hearing requested to present evidence not previously before the court to vindicate himself with respect to disputed material issues of wilful disobedience and prejudice to the defendants' case.

4. Whether there are limits to a district court's discretion, under Rule 37 (b) to dismiss a case for a party's *WILFUL* disobedience of a discovery order, in lieu of imposing alternative sanctions upon counsel as provided in Rule 37 (b), where the misconduct or delay in compliance was by counsel.

STATUTORY PROVISIONS INVOLVED

No statutes are involved. Rules 37 (b) and 60 of the Federal Rules of Civil Procedure are set out in Appendix A., pp. 1a and 2a.

STATEMENT OF THE CASE

The case below was a three-count slander action filed August 18, 1972, on the basis of diversity of citizenship jurisdiction, in the

federal district court for the eastern district of Wisconsin.

The plaintiff, a resident of Winthrop Harbor, Ill., charged that in August and September, 1970, Defendant Alida Johns, a reporter for the *Milwaukee Sentinel*, had slandered him in separate telephone conversations with three staff assistants to Congressman Robert McClory of Illinois. The thrust of Defendant Johns' alleged slurs was to dissuade Congressman McClory from seeking a Presidential Pardon for the plaintiff from convictions growing out of a 1960 tax case in Milwaukee, Wis. (The Pardon was granted in 1972.)

At a pre-trial conference on Aug. 15, 1975, for the first time, the plaintiff had to ask the court to reschedule the trial date. Plaintiff's counsel briefly explained that an emergency which had developed with respect to the plaintiff's hospital building in Milwaukee, had preoccupied him and his son Perry since the preceding April 25, 1975, pre-trial conference, had hindered completion of discovery and preparation for trial, and required additional time for resolution. The hospital is the plaintiff's only major asset, and the rent to him from leasing the facility represents his only means of satis-

fying $150,000 in outstanding tax and other obligations. Without objection, the court changed the trial date from Sept. 22, 1975, to Jan. 12, 1976.

As of the Aug. 15, 1975, pre-trial conference, 10 of 13 categories of documents informally requested by defense counse, fully had been produced by the plaintiff for review and photocopying.[2] At the Aug. 15, 1975, pre-trial conference, there was no disagreement

2. Many documents within these three categories previously had been given to defense counsel. Why, in good faith, some papers had not been considered by Perry to be relevant to inclusion in previous production, is explained at R. 185-190.

With respect to prior discovery, during 1972 and 1973, the plaintiff took the depositions of the three Congressional aides to whom Defendant Johns allegedly had slandered the plaintiff. Their testimony and contemporaneous memoranda of Defendant Johns' conversations with each of them, as well as the deposition of an Illinois state official to whom Defendant Johns also allegedly had disparaged the plaintiff and his family, were the subjects of extensive cross-examination by the defendants' counsel.

On April 9, 1974, the defendants' attorney requested that certain categories of documents be produced at the depositions to be taken of the plaintiff and his son. A period of inactivity followed because of scheduling conflicts and upon the plaintiff's filing of a motion for disqualification of the presiding judge. (R. 165-166) The case

about production of the remaining documents. As part of the new timetable, the court mentioned a deadline of Sept. 6, 1975, for completion of production. Plaintiff's counsel relayed Perry's belief that more time was

was reassigned in Oct., 1974, to the newly appointed Hon. Robert W. Warren.

On Jan. 7, 1975, the defendants' counsel took the depositions of the plaintiff and his son, at which *hundreds* of pages of documents were produced. At that time, defense counsel requested production of additional documents. On Jan. 9, 1975, plaintiff's counsel mailed additional documents to defendants' attorneys. In subsequent months, defense counsel on several occasions wrote plaintiff's attorney, reminding him about the outstanding requested documents, but plaintiff's attorney was in trial and failed to respond or notify his client of such communications until weeks or months later.

In a summary letter after a pre-trial conference held on April 25, 1975, the court reminded both attorneys that the plaintiff had agreed to produce certain documents for the defendants. No dissatisfaction concerning discovery had been expressed by the defendants' counsel. ***No admonition or order was set forth by the court*** (although, in later dismissing the case, the court said it regarded its summation letter as an order--***even though no deadline for production of the documents had been set.***).

On Aug. 14, 1975, at plaintiff's counsel's directions because he was unable to be present, Perry delivered dozens of additional documents to the defendants' attorneys, which he understood to be the balance of what they had wanted. Although they maintain that their requests had

needed to resolve the hospital difficulties, and with the parties' agreement, the court ordered a Sept. 19, 1975, deadline. This *first expressed order* was not accompanied by any warning of possible Rule 37 sanctions. Nor, as the court later observed, in recognition of the plaintiff's difficulties, was there any castigation of plaintiff for not completing production sooner. (Tr. 29)

The chronology of events with respect to the order is as follows:

> AUG. 15, 1975: The district court, *for the first time sets a deadline for completion of production of documents by the plaintiff*, ordering the remaining documents to be produced by Sept. 19, 1975.
>
> SEPT. 1, 1975: *The hospital emergency unexpectedly has worsened.* Prior to the Aug. 15, 1975, pre-trial conference, the plaintiff had obtained a local court order allowing his contractors into his hospital building to complete major modifications de-

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been clear, different wording for the same documents among several of their letters had led Perry to a different interpretation. (R. 185-187) When this became apparent on Aug. 14, 1975, Perry offered to make available the other materials, but not his personal Daytimer diary entries which concern his own clients. Associate defense counsel wanted the names of the clients (R. 99, 188-189), but this demand was withdrawn at the Aug. 15, 1975, pre-trial conference.

manded by the Wisconsin Dept. of Health. The tenant hospital operating company had been vindictive over plaintiff's suit for unpaid rent needed to pay for the contractors, had prohibited entry to the workmen, and now, through a gap in the local court order, has retarded the contractors' progress so that the work cannot be completed by the state's *Sept. 15, 1975, deadline. Threatened with invalidation of the hospital's license (R. 220-221)*, and on Sept. 1, 1975, having to take control of a closed hospital (A group which was to take over operation of the hospital on that date, has faltered.), Perry's presence at the hospital and attention to this emergency are required a minimum of six days a week through Sept. and Oct. He is working up to 18 hours a day, attempting to save the license, maintain the building, and make arrangements for reopening the hospital. (further details at R. 173-177)

In addition, during the last week in August, the plaintiff has been notified that trial is to begin on *Oct. 6, 1975*, in federal court in the western district of Wisconsin in a Civil Rights case (70-C-151) in which he is the plaintiff and also represented by Atty. Giampietro. Until learning at the end of the second week in Sept. that a continuance has been granted because of the hospital crisis, whatever spare time Perry can find is spent in final preparation for trial. (further details at R. 178-179)

SEPT. 10, 1975: *THE PLAINTIFF HAS DEVELOPED A SERIOUS, PAINFUL, AND RAPIDLY WORSENING PROCTOLOGICAL CONDITION. HIS ACTIVITIES ARE SHARPLY CURTAILED, AND HE IS LARGELY CONFINED TO BED. THIS PUTS SUBSTANTIAL ADDITIONAL RESPONSIBILITIES ONTO PERRY, BECAUSE THEY PREVIOUSLY HAD BEEN WORKING CLOSELY TOGETHER ON THE HOSPITAL EMERGENCY. DESPITE SEVERAL ATTEMPTS, THE PLAINTIFF NO LONGER CAN HANDLE THIS AND OTHER PERSONAL AND BUSINESS MATTERS. PERRY CONTACTS PLAINTIFF'S COUNSEL AND ASKS HIM TO ADVISE THE COURT OF THE DETERIORATION AND TO REQUEST RESCHEDULING OF PROCEEDINGS IN THE CASE (INCLUDING THE DISCOVERY DEADLINE) FOR SEVERAL MONTHS. COUNSEL AGREES TO DO SO. (The request of counsel is discussed in the petition for rehearing to the court of appeals, pp. 1-3. further details of the plaintiff's illness at R. 179-180)*

OCT. 15, 1975: *THE PLAINTIFF'S CONDITION HAS FURTHER DETERIORATED, HAS NOT RESPONDED TO MEDICAL TREATMENT, AND REQUIRES SURGERY. HE GOES TO THE MAYO CLINIC, ROCHESTER, MINN.*

OCT. 16, 1975: *FOLLOWING UP ON ANOTHER TELEPHONE CONVERSATION IN WHICH PLAINTIFF'S ATTORNEY SAID HE WOULD CONTACT THE COURT, PERRY WRITES PLAINTIFF'S COUNSEL ABOUT REQUESTING THE RESCHEDULING FROM THE COURT. HIS LETTER REFERS NOT MERELY TO DISCOVERY, BUT TO THE TRIAL ITSELF, BECAUSE PERRY WAS TO BE ASSISTING COUNSEL IN OTHER AREAS, E.G., OBTAINING EXPERT WITNESSES. (R., 424-425. ALSO EXHIBIT "A" IN PETITION FOR REHEARING TO COURT OF APPEALS, AND DISCUSSED THEREIN AT PP. 2-3)*

OCT. 20, 1975: *THE PLAINTIFF UNDERGOES SURGERY AT THE METHODIST HOSPITAL, ROCHESTER, MINN., AND REMAINS HOSPITALIZED THERE UNTIL OCT. 25, 1975.*

OCT. 23, 1975: The defendants file a motion under Rule 36 (b) (2) (C) to dismiss the case for plaintiff's wilful noncompliance with the court's Aug. 15, 1975, order.

OCT. 28, 1975: Plaintiff's counsel writes to Perry, asking for immediate delivery of the remaining documents to him in Chicago. Upon receipt of the letter, Perry telephones him and offers to bring the papers immediately, but plaintiff's counsel, who is in the midst of another trial, sets an appointment for Nov. 6 to receive and review the papers with Perry. (R. 365)

NOV. 6, 1975: *THE PLAINTIFF'S WIFE AND SON PERSONALLY DELIVER TO PLAINTIFF'S COUNSEL ALL OF THE DOCUMENTS REMAINING TO BE PRODUCED.* They review, in particular, Perry's Daytimer diary entries concerning his own clients which are not to be shown to defense counsel.

NOV. 10, 1975: Plaintiff's counsel contacts defendants' attorneys and arranges to take the documents to them on Nov. 24, 1975. He is unable to drive to Milwaukee sooner because of court appearances every day until then, and because he is in the process of moving his office. (R. 393)

NOV. 12, 1975: The plaintiff has remained weakened since surgery last month. His health again is deteriorating, and he again is largely confined to bedrest.

NOV. 24, 1975: Plaintiff's counsel personally delivers all of the remaining documents to defendants' attorneys. Included in these papers are many documents which they already had in their possession. One letter produced with the remaining documents (and was sent by Perry to Mr. Arthur Schiff, a witness in the case) is identified as recently having been discovered as misfiled--and was not knowingly withheld from previously produced documents. (R. 190-192) Perry is present and deciphers and answers defense counsel's questions about his handwritten Daytimer diary entries.

DEC. 4, 1975: *THE PLAINTIFF IS REHOSPITALIZED AT THE KENOSHA, WIS., MEMORIAL HOSPITAL.*

DEC. 7, 1975: *WHILE HOSPITALIZED, THE PLAINTIFF COLLAPSES WITH A HEART ATTACK AND IS RUSHED TO THE CORONARY/INTENSIVE CARE UNIT IN CRITICAL CONDITION. (R. 179-180)*

DEC. 11, 1975: The plaintiff's attending physician states in a letter to the district court that the plaintiff is in serious condition in the coronary care unit and cannot go to trial on Jan. 12, 1976. (R. 152, 365) Perry has requested the letter, even though a final diagnosis has not yet been rendered--so that the court can be given ample notice. The letter is sent to plaintiff's counsel who advises Perry that he immediately is forwarding it to the court and requesting that the Jan. 5, 1976, final pre-trial conference and Jan. 12, 1976, trial date be rescheduled for several months later in accordance with the attending physician's letter.

DEC. 20, 1975: The plaintiff is released from the hospital and is ordered to remain at complete bedrest at home for at least three to four weeks.

JAN. 5, 1976: At what is to be the final pre-trial conference, plaintiff's attorney first informs the court of the plaintiff's heart attack. He has not prepared the final pre-trial order, apologizes, and explains that he was moving his residence in Dec. and took ill. (R. 152, 365, Tr. 20-21) *WITHOUT ANY PRIOR NOTICE OF A HEARING ON THE MOTION TO DISMISS, THE COURT ASKS FOR ORAL ARGUMENTS ON THE MOTION.* Not only does the plaintiff's ill health preclude his being present, but his son--who is home attending to his father--is under the impression that the pre-trial conference has been cancelled for this date.

Defendants' attorney argues that discovery disobedience has been wilful because the plaintiff and his son personally heard the Aug. 15, 1975, order; that the developments after that conference were no excuse for noncompliance; *AND THAT THE PLAINTIFF HAD WITHHELD THE REMAINING DOCUMENTS FROM HIS COUNSEL UNTIL NOV. 24, 1975!* When the court asks plaintiff's attorney if the Nov. 24 date is correct, he mistakenly agrees.[3]

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3. Later, in seeking reinstatement of the case, plaintiff's counsel corrects his error. (R. 393) The affidavit dated Nov. 17, 1975, which counsel had prepared for Perry in opposition to the motion to dismiss, confirms that as of that date, the remaining documents already had been given to plaintiff's counsel. (R. 120-121)

Differentiating between misconduct which should be attributed to counsel and that for which the plaintiff is responsible, the court concludes that the disobedience of its order is attributable to plaintiff and not to counsel. (Tr. 42) It grants the motion to dismiss.

FEB. 4, 1976: Plaintiff files a motion under Fed. R. Civ. P. 60 (b) to set aside the judgment of dismissal. In two supporting affidavits, Perry sets forth, at length, narratives of the plaintiff's illnesses and hospitalization, and of the additional adversity which caused compliance to occur after the Sept. 19, 1975 deadline. He asks for a hearing at which to produce hospital records, Daytimer diaries, and other documents to vindicate the plaintiff's position with respect to the court's Aug. 15, 1975, order.

MARCH 15, 1976: The district court denies a hearing on the motion to vacate judgment, as well as the motion itself.

REASONS FOR GRANTING THE WRIT

1. The decisions of the lower courts in this case have entirely ignored and are in conflict with the ruling of this Court in *Societe Internationale*, i.e., that dismissal under Rule 37 is not proper for noncompliance with a pretrial production order where failure to comply has been due to inability, and not to wilfulness, bad faith, or any fault of the petitioner. 357 U.S. at 208.

The opinions of the district court took no cognizance that the delay in compliance with its Aug. 15, 1975, order occurred under circumstances of the plaintiff's illness, hospitalization, and surgery and personal adversity to the plaintiff and his son. The order of the court of appeal affirmed dismissal even though it noted without disputation the presentation of plaintiff's hardships as "reasonable explanations" for the delay in compliance with the district court's order. (App. A., p. 9a)

The extent to which the decisions below in this case are contrary to Rule 37 case law which has evolved from this Court's decision in *Societe Internationale*, is demonstrated by the fact that there are virtually *NO* reported modern federal cases which have upheld dismissal or default judgment for nonproduction of documents were either:

a. noncompliance occurred under circumstances of personal illness or hardship; or

b. the extreme sanction of dismissal or default judgment was imposed *AFTER* full, albeit tardy compliance.

2. The *National Hockey League* decision was the first time in 18 years, and only the second time since the adoption of the Federal

Rules of Civil Procedure in 1938, that this Court has undertaken to construe Rule 37. Both decisions leave unanswered several fundamental questions of due process affecting the application of Rule 37 to the mainstream of cases in which it is invoked.

This case presents to this Court for the first time, the question whether there are any due process limitations upon a district court's *INITIAL* choice of sanctions under Rule 37 for discovery disobedience where lesser sanctions than dismissal would be equally effective in securing compliance.

The importance of this issue has been raised by the misapplication by the court of appeals to such situations, of this Court's decision in *National Hockey League* where dismissal was held as proper in the specific factual context of substantial discovery noncompliance after numerous extensions, unbroken promises and commitments to the district court by the defaulting plaintiff, and finally, *AFTER WARNINGS OF IMPOSITION OF RULE 37 SANCTIONS UPON FURTHER DEFAULT*. Such a misinterpretation, if not corrected by this Court, threatens to vitiate a sound body of Rule 37 authority and case law by which many occurrences of noncompliance heretofore have been resolved, and which would have dictated

lesser sanctions in this case, *viz.*,

> A district court, when *INITIALLY* considering sanctions for discovery noncompliance, should allow one more opportunity to comply "where an alternative, less drastic sanction (than dismissal or default judgment) would be just as effective." Hon. Sterry R. Waterman, *An Appellate Judge's Approach When Reviewing District Court Sanctions Imposed for the Purpose of Insuring Compliance With Pretrial Orders," 29* F.R.D. *191 (1961)* (emphasis added). In such a situation, a district court often either warns that any further failure to comply will result in dismissal or a default judgment; or it makes a conditional order that such a judgment is to be entered if there is not full compliance by a specified date.

This approach has been implemented by a number of circuits.[4] It is entirely consistent with

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4. 8 Wright & Miller, *Federal Practice & Procedure*, S. 2284 at pp. 768-772. The Seventh Circuit in recent years twice has held as abuses of discretion district courts' dismissals/default judgments without first implementing lesser, equally effective sanctions. *Sapiro v. Hartford Fire Ins. Co.*, 452 F.2d 215 (7th Cir., 1971), and *Vac-Air, Inc. v. John Mohr & Sons, Inc.*, 471 F.2d 231 (7th Cir., 1973). Misconstruing and abdicating what the petitioner submits was its proper appellate mandate under *National Hockey League* to do likewise in this case, i.e., review the district court's abuse of discretion, the court of appeals instead said that it was "not free to substitute the exercise of our own discretion for that of the district court...Indeed,

this Court's decision in *National Hockey League* in that it enables a district court to efficaciously enter an appropriate harsher penalty for a recalcitrant party. At the same time, it recognizes that the law favors disposition of cases upon their merits (*Scarver v. Allen*, 457 F.2d 308, 7th Cir., 1972); that the primary function of Rule 37 is to secure compliance (*Robison v. Transamerica Ins. Co.*, 368 F.2d 37, 10th Cir., 1966); and that "the dismissal of an action with prejudice is a drastic remedy and should be applied only in extreme circumstances" (*Bon Air Hotel, Inc. v. Time, Inc.*, 376 F.2d 118, 5th Cir., 1967).

Consistent with such case law, the 1970 amendments to Rule 37 were drafted to encourage

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were the matter one for the original exercise of this court's discretion, a close question would have been presented...whether some remedial sanction other than dismissal was just and appropriate." (App. A., pp. 10a-11a) This position also conflicts with the Fifth Circuit's recent decision which cited *National Hockey League* and re-emphasized appellate responsibility to scrupulously review the exercise of extreme sanctions lest they be used too lightly: "When the disobedient party shows that his recalcitrance was based on factors beyond his control or on his exercise of Constitutional privilege, a reviewing court is justified in terming the dismissal an abuse of discretion." *Emerick v. Fenick Industries, Inc.*, 539 F.2d at 1381 (5th Cir., 1976).

its greater use by providing the courts with more flexible and, where appropriate, softer sanctions than previously existed. *Flaks v. Koegel*, 504 F.2d 702 (2d Cir., 1974).

Certiorari was granted in *National Hockey League* because of such "flagrant bad faith" by the plaintiff that the district court had said it could envisage no set of facts warranting dismissal, if not those of that case. 49 L. Ed. 2d at 750. However, the court of appeals in this case applied the same rationale for the same extreme punishment to a case, the surrounding facts of which stand in sharp contrast to those in *National Hockey League*. Here, not only was the severest sanction imposed ***AFTER*** there had been undisputedly ***FULL***, though tardy compliance with a ***FIRST DISCOVERY DEADLINE***; and not only had there been ***NO PRIOR WARNING*** of possible Rule 37 sanctions; but also, ***THE DELAY IN COMPLIANCE OCCURRED DURING A PERIOD OF SERIOUS ILLNESS AND ADVERSITY TO THE PLAINTIFF, THE EXISTENCE OF WHICH, IF NOT THE SPECIFIC DETAILS, WAS KNOWN TO THE DISTRICT COURT AND HAD BEEN THE BASIS FOR THE COURT RESCHEDULING THE TRIAL DATE PAST THIS PERIOD OF HARDSHIP***. The order simply was part of an agreed new timetable and was not made upon any complaint by the defendants that the plaintiff was not cooperating

in discovery. The record, as clarified below by the plaintiff, shows that the aforementioned unexpected deterioration in his health and the unanticipated inability to turn around and resolve his overwhelming personal crises in the weeks following the Aug. 15, 1975, pre-trial conference, accounted for delay rather than any elements of refusal or obstinacy such as have been the hallmarks of Rule 37 cases where dismissals or default judgments have been affirmed.

Failing to recognize that this Court, in *National Hockey League*, did not eliminate *LENITY* as a significant factor in considering the impositon of sanctions, the court of appeals said in this case: "Any effort on the part of this court to promote lenity rather than the harshness of an outright dismissal would undermine important objectives of Rule 37." (App. A., p. 10a) Such a Draconian interpretation, petitioner believes, was not intended by this Court. It contravenes the holdings of this court in *Societe Internationale, viz.*, that the authors of Rule 37 were well aware that:

> "There are Constitutional limitations upon the powers of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause...It is unconstitutional for a party to be denied a

> trial "as mere punishment.'" 357 U.S. at 209-210.

Where this Court in *National Hockey League* attempted to strike a balance among the policy considerations of Rule 37 sanctions, the court of appeals in this case took license--where there was no indication that the district court had considered any lesser initial sanctions--in effect, to approve the use of an elephant gun on an ant. Without clarification by this Court, other courts, too, may misconstrue *National Hockey League* as supplanting previous Rule 37 case law rather than defining its proper limits, and consequently may justify arbitrary and unwarranted dismissals and default judgments without heed to the Constitutional constraints previously recognized by this Court.

3. This case seeks confirmation that the due process limitations to the application of Rule 37 sanctions, of which this Court took general notice 18 years ago in *Societe Internationale*, are applicable to the procedures by which a district court may dismiss a party's case, for discovery noncompliance. This Court has not spoken to this issue, specifically whether, when there is a material dispute as to wilfulness or prejudice to an adversary's

case, a party against whom dismissal is sought or has been granted under Rule 37, should be permitted a hearing he requests to present evidence notpreviously before the court, in order to vindicate himself. That Rule 37 dismissals should not be allowed in such contested situations on what otherwise may be inadequate records, is critical in light of the limitations which this Court's decision in *National Hockey League* has placed on the scope of appellate review of Rule 37 dismissals. 49 L. Ed. 2d at 751.

The rulings in the instant case conflict with previous, widely held procedural assumptions as embodied in the Second Circuit's decision in *Flaks v. Koegel:*

> "...Generally, a judge should not resolve factual disputes on affidavits or depositions, for then he is merely showing preference for one piece of paper to another...As we have previously indicated, due process Constitutional considerations underlie Rule 37 dispositions. We consider the failure of the court here to conduct an evidentiary hearing in order to determine the question of defendants' wilfulness an abuse of discretion...The matter could not be determined on the basis of conflicting and competing affidavits." *supra*, 504 F.2d at 712-713.

This case is appropriate for this Court's consideration, because it is difficult to imagine a situation more demonstrative of the need for an evidentiary hearing than here, where there are sharp disputes both whether there had been wilful disobedience of the court's discovery order, and whether, in actuality, the movant's case had been prejudiced by the tardy completion of production of documents. The materials submitted in support of the request for a hearing arose, as in *Flaks v. Koegel*, on a Rule 60 (b) motion to vacate judgment.[5] They emphasized that the plaintiff's son was prepared to present evidence proving that:

a. *THE DEFENDANTS PREVIOUSLY HAD RECEIVED THE SAME INFORMATION WHICH THEY CLAIMED NOT TO HAVE BEEN GIVEN TO THEM TIMELY:*

The district court granted the motion to dismiss upon the defendants' contentions that

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5. The importance of Rule 60 (b) as a corrective remedy for improper dismissals, was expressed by this Court in *Link v. Wabash R. Co.*, 370 U.S. 626 (1962). This Court held that dismissal for failure to prosecute, under Fed. R. Civ. P. 41--without holding an adversary hearing--was proper under the particular circumstances of that case wherein counsel had failed both to attend a pre-trial conference and to seek to provide "a more adequate explanation" for his neglect, through "the escape hatch" provided by Rule 60 (b)." 370 U.S. at 632, 635.

their case had been prejudiced by the tardy production of dozens of remaining documents--primarily additional entries in Perry's Day-timer diary--which allegedly "went to the heart of the case," and that substantial new discovery would be required. (R. 141) Yet, the district court dismissed the case without the defendants supporting their claim with any showing of the prejudicial content of any tardily produced document. Not until they submitted their brief in opposition to the motion to vacate judgment, did they first set forth any such specifics. In response,Perry wrote the court that he was prepared to prove at the requested hearing that the defendants had misrepresented to the court--i.e., they timely had received the same facts and information in question.

To demonstrate the merit and good faith of his request, Perry took several examples cited by the defendants and delineated how the allegedly withheld information had been given to them prior to the Aug. 15, 1975, order. (R. 368-373) The district court erred in dismissing this argument as substantially identical to that presented in opposition to the motion to dismiss (App. A., p. 19a), because at the earlier stage, the plaintiff

could only point out that the defendants had not provided any particulars in support of their motion. Affirmation by the court of appeals that no hearing was warranted, was based on its erroneous statement that Perry had requested a hearing merely "to answer any questions the judge might have." (App. A., p. 6a) It overlooked the fact that as part of his request, he also twice wrote that he was prepared to provide at the hearing other documents--*WHICH WERE NOT IN THE RECORD*--to prove his point. (R. 371, 374) This also was emphasized in the petition for a rehearing before the court of appeals (p. 5), and as such, is in contrast to the circumstances in *Thomas v. U.S.*, 531 F.2d 746 (5th Cir., 1976), where denial of a hearing was upheld because *all* the essential facts already were in the record.

b. *DELAY IN COMPLIANCE OCCURRED BECAUSE OF THE PLAINTIFF'S SERIOUS ILLNESS AND PERSONAL HARDSHIP:*

In support of the motion to dismiss, the defendants' counsel had argued to the district court that the plaintiff's difficulties were neither as serious as represented nor any excuse for tardy compliance with the court's order.

Perry asked for the opportunity to present

to the court hospital records and Daytimer diary entries to verify the overwhelming nature of the hardships during the period of delay.

The attacks by the defendants upon plaintiff's good faith, provides additional perspective into the need for recognition by this Court of procedural due process requirments where dismissal is sought under Rule 37. The defendants were not satisfied only to raise any and all possible questions about the plaintiff's difficulties, and about the quantity and contents of the materials which had been given to them timely. They also forcefully and successfully opposed plaintiff's request for a hearing which he sought to introduce evidence to remove the doubts which the defendants had created. Defense counsel argued that the Jan. 5, 1976, pre-trial conference had constituted a hearing even though the court had given *NO ADVANCE NOTICE* that there would be a hearing on the motion to dismiss, and even though the precarious state of plaintiff's health precluded his attendance at the pre-trial conference (which plaintiff's attorney had misinformed Perry in preceding weeks that he was asking to have postponed).

That an evidentiary hearing on the motion

to vacate judgment was appropriate under the circumstances of this case, is demonstrated by the transcript of the Jan. 5, 1976, pre-trial conference, which shows plaintiff's counsel repeatedly expressing his unfamiliarity with details of the plaintiff's personal difficulties, and his inability to answer key questions concerning them put to him by the court. (Tr. 19, 21, 24-27, 36) Indeed, in dismissing the case, the district court was unaware that prior to its Sept. 19, 1975, discovery deadline, the plaintiff had taken ill and was largely disabled; that there was a specific Sept. 15, 1975, state compliance deadline for his hospital which he and his son had been obstructed and delayed in meeting; and that the plaintiff's son was asking plaintiff's counsel to bring these developments to the attention of the court as part of a request for rescheduling of proceedings in the case.

Petitioner asks this Court to proscribe such denial of due process as occurred when he was denied a hearing at which to introduce evidence to vindicate his and his son's conduct with respect to the court's discovery order. Fifth Amendment considerations should not permit a district court under such circumstances to extinguish a party's claim on the basis of

uninformed, factually erroneous, and partisan argument instead of a definitive evidentiary record.

4. In 1962, this Court said in *Link v. Wabash R. Co., supra.*, 370 U.S. 626, that a party's case may be dismissed because of neglect of counsel. However, writing for the 4-3 majority, Justice Harlan commented on a significant limitation of that case, i.e., this Court was not considering whether its decision might have been different had the petitioner made a Rule 60 (b) motion to vacate judgment on the basis of excusable neglect, instead of proceeding directly to an appellate court. 370 U.S. at 635. This gap in *Link* and the fact that it was a Rule 41 case for failure to prosecute, have led a number of courts in the intervening 15 years to adopt Justice Balck's vigorous dissent in *Link* in the belief that under different federal rules and circumstances, *THE SINS OF THE LAWYER SHOULD NOT BE VISITED UPON HIS CLIENT. Durham v. Florida East Coast R. Co.*, 385 F.2d 366 (5th Cir., 1967) Some judges are careful to determine, prior to entering sanctions against a litigant, that discovery default has resulted from the party's recalcitrance rather than neglect of counsel, e.g.,

DiGregorio v. First Rediscount Corp., 506 F.2d 781 (3rd Cir., 1974). In recent years, some courts have ordered lawyers at fault to bear costs and/or reasonable opposing counsel's fees, e.g., *Fischer v. Buehl*, 450 F.2d 950 (5th Cir., 1971). Such better focused sanctions have been recommended for their appropriateness and deterrent effect as clearly the solution most consistent with the Federal Rules of Civil Procedure. *7 Moore Federal Practice*, S. 60.27 (2) at 369 (2d ed., 1975). Effective and more equitable alternatives to the theory of strict identification of attorney and client in such instances are proposed in a discussion of *Link* in *Power of Federal Courts to Discipline Attorneys for Delay in Pre-trial Procedure*, 38 *Notre Dame Law.* 158 (1963). Also see the dissenting opinion in *Ali v. A. & G. Co., Inc.*, 542 F.2d at 597 (2d Cir., 1976).

Nowhere has the need for clarification of *Link* become more evident than in Rule 37 dismissals. Lower courts have proceeded under the distinction made by this Court requiring a more deliberate level of misconduct for dismissal under Rule 37 for discovery non-compliance--*wilfulness* under *Societe Internationale*--than under Rule 41 for failure to prosecute--*neglect* under *Link*. *S.E.C. v.*

Research Automation Corp., 521 F.2d 588 (2d Cir., 1975). Also see 58 *Columbia Law Review* at 490, 1958. Consequently, a considerable body of authority--which has been ignored below in this case--has developed which will not ascribe discovery neglect by counsel per se to intentional or wilful disobedience by his client for the purpose of imposing dismissal under Rule 37. See cases cited in *Flaks v. Koegel, supra.*, at 712-713. That such a distinction from wilfulness is both proper and desirable, has been advocated in the authoritative article by Prof. Maurice Rosenberg, to which the Advisory Committee note to the 1970 admendments to Rule 37 referred for defining *wilful* as used throughout Rule 37 to bring it into harmony with *Societe Internationale:*

> "When a party fails to appear for his deposition or to respond to a proper set of interrogatories, *IT IS OFTEN BECAUSE HIS ATTORNEY IS OUT OF TOUCH WITH HIS RESPONSIBILITIES.*" 58 *Columbia Law Review, supra.*, at 490-491, 1958 (emphasis added).

Accordingly, the amended Rule 37 expressly provides for discovery sanctions against a party's attorney.

This case is opportune for this Court to harmonize *Link* with the above-mentioned growing body of authority. The transcript of the Jan.

5, 1976, pre-trial conference shows the district court to have been inclined not to punish the plaintiff for his counsel's laxity, and to have granted the motion to dismiss on the basis of misstatements which led it to wrongly conclude that the plaintiff had withheld the remaining documents from counsel until Nov. 24, 1975. But when, as part of the Rule 60 (b) motion to vacate judgment, this was corrected, i.e., the documents, in fact, had been delivered to counsel on Nov. 6, 1975, the court refused relief with the indiscriminate statement that there had been wilful or conscious discovery noncompliance "on the part of the plaintiff and/or his agents and/or attorneys." (App. A., p. 19a) The court of appeals made no effort to distinguish between neglect by counsel, as opposed to any by his client, after this issue was crystallized in the petition for a rehearing. The opinion of the court of appeals said that the district court should have been informed prior to the deadline had the plaintiff been unable to comply timely. (App. A, p. 9a) That counsel, despite his assurances to Perry that he was doing so, did not convey such information to the court, should not have been construed as wilful disobedience on the part of the plaintiff.

This case exemplifies the need for recognizing that some types of neglect by counsel, e.g., discovery noncompliance--absent bad faith or fault by his client--should lead a court under appropriate circumstances to impose sanctions upon counsel rather than to dismiss his client's case. Additionally, this case is appropriate for clarification of *Link* because of the presence of inability or hardship which this Court observed to have been absent in *Link* and which, it said, would have introduced other policy considerations in mitigation of dismissal. 370 U.S. at 636.

Petitioner submits that a statement on this important point of Federal Civil Procedure would harmonize the conflicts of authority among the circuits and the ensuing difficulty which other courts have encountered in reconciling the imposition of appropriate alternative sanctions for attorneys' neglect with the restrictive language in *Link*.

CONCLUSION

For the above reasons, Petitioner prays that a Writ of Certiorari be granted.

Respectfully submitted,

Perry Margoles
312 Holdridge Avenue
Winthrop Harbor, Ill. 60096
Attorney for Petitioner

APPENDIX

APPENDIX A

Rule 37. Failure to Make Discovery: Consequences . . .

(b) FAILURE TO COMPLY WITH ORDER.

(1) SANCTIONS BY COURT IN DISTRICT WHERE DEPOSITION IS TAKEN. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) SANCTIONS BY COURT IN WHICH ACTION IS PENDING. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addi-

tion thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Rule 60. Relief From Judgment or Order.

(a) CLERICAL MISTAKES. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) MISTAKES; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, ETC. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); (3) fraud (whether heretofore denominated in-

trinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, USC, § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

ORDER OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

October 14, 1976

Before Hon. Latham Castle, Senior Circuit Judge; Walter J. Cummings, Circuit Judge; and Wilbur F. Pell, Jr., Circuit Judge

DR. MILTON MARGOLES, M.D.,
Plaintiff-Appellant,

vs.

ALIDA JOHNS AND
THE JOURNAL COMPANY,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin. No. 72-C-470, Robert W. Warren, Judge.

ORDER

This is an appeal from an order dismissing a diversity slander action for willful failure to obey the court's orders that the plaintiff produce documents and from an order denying relief from the judgment of dismissal. The issues on appeal are 1) whether the district court abused its discretion in dismissing the plaintiff's cause of action for failure to produce documents for discovery when that production was not refused but was only tardy, 2) whether the district court abused its discretion in refusing to hold a hearing in connection with the tardy production of documents for discovery and the sanctions to be applied therefor, and 3) whether the plaintiff's case may be dismissed for failure to produce documents when the tardy production was not his failure but that of his son, a non-party to the case.

The pertinent facts are simply stated. On August 18, 1972, Dr. Milton Margoles filed a complaint charging that he was slandered by Alida Johns, a Milwaukee Sentinel reporter, in three telephone conversations on or about August 20 and September 2, 1970. Approximately twenty months later, after preliminary discovery and status conferences, the defendants by letter, pursuant to a course of discovery by stipulation without subpoenas or formal demands, listed documents the defendants wished produced for inspection and copying. Seven months later, on November 8, 1974, the defendants repeated the request for the documents. A letter of February 6, 1975 reminded plaintiff's counsel that the documents were still to be produced. At a

pretrial conference on April 25, 1975, where plaintiff, his son Perry, and plaintiff's counsel were present, the plaintiff agreed to produce the requested documents. On April 29, 1975, the district court judge sent a summation letter, which the court treated as an order, reminding the plaintiff's counsel of the agreement to produce the documents. On August 15, 1975, at another pretrial conference, again attended by the plaintiff, his son Perry, and plaintiff's counsel, the court ordered plaintiff to produce the remaining documents by September 19, 1975.1/ The court again sent a written summation of the conference on August 19, 1975, and once again specified that plaintiff was to produce the documents by the designated date.

The plaintiff did not produce the documents at the designated time, and defendants moved for dismissal under Fed.R.Civ.P. 37 (b) (2) (C) on October 23, 1975. On November 24, 1975, Perry Margoles and plaintiff's counsel delivered the requested documents to defense counsel,who received them under the understanding that the receipt of the documents was without prejudice to defendants' motion to dismiss. The court heard oral argument on the motion on January 5, 1976. Based upon all the information before the court, including affidavits, briefs and arguments of counsel, the court made

> a specific finding that the failure to produce herein is willful, that it is prejudicial, that the matter sought to be produced is highly rele-

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1/ Originally at the pretrial conference in August, the court had ordered production by September 6 "so as to permit ample time for defendants to review the documents to be

> vant and material to the case and it was and is within the plaintiff's control, and that the failure to produce that and to comply with the procedural orders of the Court has been so prejudicial that the sanction (of dismissal) is appropriate.

Subsequently, the court signed a formal written order reciting that the failure of the plaintiff to obey the orders for discovery was willful, and a judgment of dismissal was entered.

Three weeks later, on January 29, 1976, Perry Margoles submitted a 40-page, sworn letter to the district court judge explaining why the documentary production was delayed and specifically denying that he willfully or consciously disobeyed the court's order of August 15, 1975. This affidavit recited numerous facts and details which plaintiff's son believed were unknown to the district court judge prior to his consideration of the defendants' motion. Perry Margoles emphasized that the tardiness in the production of the documents "in no way was intended by us and did not constitute refusal to produce them." After apologizing for any inconvenience caused by the delay of several months in the documentary production, Perry's letter asked for the opportunity to answer at a hearing any question the judge might have in order to establish "to your satisfaction that I have acted in

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produced and make final preparation for trial." At the request of counsel for the plaintiff the time was extended to September 19, 1975.

good faith and did not wilfully or consciously disobey your order."

On February 4, 1976, plaintiff moved to vacate the order of dismissal. Two weeks later, the defendants filed a 50-page brief in opposition to the motion. On February 24, 1976, Perry wrote a second, 19-page sworn letter which delineated the issue before the court and set forth facts which he deemed to be sufficient to justify reinstatement of the case. The letter noted that

> (W)hether I intended to disobey your order, rather than the fact that I tardily obeyed it, is the sole issue as to whether this case should have been dismissed.
>
> The record is devoid of any facts which would support a subjective judgment that my state of mind was to deliberately disobey your order. . . . Unlike other cases where the court was left with no alternative except to dismiss the case because a party had refused to produce documents, here there was no such refusal requiring your intervention.

The letter concluded by requesting that, consistent with the body of case law under Federal Rule 37 (b) (2) (C), the judge reinstate the case and let justice be done according to its merits. Approximately one week later, plaintiff's counsel submitted a memorandum of law noting that the failure to produce the documents was not the fault of the plaintiff but of others.

On March 15, 1976, after reviewing the written record, including the various briefs and affidavits submitted in support of and in opposition to the Rule 60 (b) motion, the

district court found no reason to alter the order of dismissal that had earlier been entered and denied the motion. The court adhered to its view that the facts of the case demonstrated failures to comply with clear and repeated discovery orders on the part of the plaintiff and/or his agents and/or attorneys, that these failures were done either wilfully or in conscious disregard of the court's specific decrees, and that there was ample justification for the entry of an order of dismissal under Fed.R.Civ.P. 37 (b) (2) (C). Noting that another hearing on the matters had been requested, the court found that no additional oral argument or testimony would be appropriate.

I

The appellant contends that the action of the district court ignored the admonition of this court that "where an alternative, less drastic, sanction would be just as effective it should be utilized." *Sapiro v. Hartford Ins. Co.*, 452 F.2d 215, 216 (7th Cir. 1972). After reviewing the record, we are left with some doubt as to whether other sanctions were considered. Thus, we are placed in a position similar to that of the Third Circuit in *In Re Professional Hockey Antitrust Litigation*, 531 F.2d 1188 (3rd Cir. 1976), *Rev'd sub nomine National Hockey League v. Metropolitan Hockey Club, Inc.*, __ U.S. __, No. 75-1558, 44 U.S.L.W. 3754 (June 30, 1976). In that case, the Third Circuit carefully reviewed the record and concluded that there was insufficient evidence to support a finding that M-BG's failure to file supplemental answers was in flagrant bad faith, willful or intentional. 531 F.2d at 1195. On appeal, however, the Supreme Court disapproved the lenity evidenced in the opinion of the Court of Appeals, and concluded that the district court did

not abuse its discretion in concluding that the extreme sanction of dismissal was appropriate. Quite pointedly, the Supreme Court observed that the question was not whether that Court or the Court of Appeals as an original matter would have dismissed the action but whether the district court abused its discretion in so doing. 44 U.S.L.W. at 3755.

In the present case, the district court has twice found that the failures to produce were done willfully. Upon a review of the record, we think that these findings are supportable. In addition to the overall substantial time lapse during which the items in question were not produced, we note that shortly after plaintiff's counsel received the motion to dismiss (late October), he informed Perry Margoles "that it was imperative that he immediately produce all documents requested by defendants' counsel which had not yet been produced." The documents were delivered to plaintiff's counsel after the Damoclean threat on November 6 but were not actually put in the hands of opposing counsel until November 24. We are not unmindful of the numerous factors advanced both by the counsel and by Perry Margoles as being reasonable explanations for all stages of the delay. It would appear to us when facing a procedural deadline with which because of factors supposedly beyond control counsel are unable to comply that counsel would always be well advised to file *before* the crucial date a motion for an extension setting forth specifically the reasons for the request. While doing so here might not necessarily have made any difference in the district court's ultimate ruling, the fact remains that there was no communication with the court on the subject.

Under *National Hockey League, supra,* we are not free to substitute the exercise of our own discretion for that of the district court. Any effort on the part of this court to promote lenity rather than the harshness of an outright dismissal would undermine important objectives of Rule 37.

II

Rule 37 (b) (2) states that if a party or a managing agent of a party fails to obey an order to provide or permit discovery, the court in which the action is pending may make such orders as are just, including dismissing the action. Assuming arguendo that there was no willful disobedience on the part of the plaintiff, the question arises whether the sanction directed at the plaintiff because of the willful disobedience of his son Perry is just. The record establishes that the deadline for the production of documents was personally communicated to the plaintiff, and his son, and that it was a current, not a long-prior forgotten, order. The record further establishes that the plaintiff had turned over to his son the basic task of producing the requested documents and that those tardily produced were in fact in Perry's possession.

In this case, however, the district court was amply justified in treating the failure of the son as that of the plaintiff. Since Perry was the "alter ego" of his father for purposes of documentary production, the court could consider the failure of the non-party as that of the party. *Cf. Flaks v. Koegel,* 504 F.2d 702, 710 n. 6 (2d Cir. 1974). Accordingly, it is unnecessary to determine whether the phrase "managing agent" as used in Rule 37 applies solely to corporate parties to the exclusion of individual parties.

III

The appellant contends that the failure of the district court to grant an evidentiary hearing wherein he would have had an opportunity to explain in person and fully why the production of documents did not come in a timely fashion was an abuse of discretion. The record clearly establishes that prior to the ruling on the Rule 60 (b) motion the district court was provided with voluminous factual detail relating to the reason for the untimely compliance. Indeed, were the matter one for the original exercise of this court's discretion, a close question would have been presented on the basis of Perry's narrative account of the history of the case and of the untimely production as to whether some remedial sanction other than dismissal was just and appropriate. Upon a full review of the record, however, we are constrained to agree with the district court that a hearing at which further oral argument and testimony were given was not required. The briefs and affidavits fully recounted the circumstances surrounding the noncompliance with the court's order. Any further testimony would have been cumulative. We find no abuse of discretion in the district court's ruling that such a hearing was not appropriate.

For the reasons hereinbefore stated, the judgments dismissing the action as a Rule 37 (b) (2) (C) sanction and denying the motion for relief under Rule 60 (b) are affirmed.

AFFIRMED.

(ORDER DENYING REHEARING)

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

November 16, 1976

Before Hon. Latham Castle, Senior Circuit Judge; Walter J. Cummings, Circuit Judge; and Wilbur F. Pell, Jr., Circuit Judge

DR. MILTON MARGOLES, M.D.,
Plaintiff-Appellant,

vs.

ALIDA JOHNS AND
THE JOURNAL COMPANY,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin. No. 72-C-470, Robert W. Warren, Judge

On consideration of the petition of the plaintiff-appellant, Dr. Milton Margoles, M.D., for a rehearing by the court in the above-entitled appeal, and the panel having voted to deny a rehearing,

IT IS ORDERED that the petition of the plaintiff-appellant for a rehearing in the above-entitled appeal be, and the same is hereby denied.

ORDER DISMISSING ACTION

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

DR. MILTON MARGOLES, M.D.,
Plaintiff,

vs.

ALIDA JOHNS AND
THE JOURNAL COMPANY,
a corporation,
Defendants.

Civil Action
No. 72-C-470

Proceedings having occurred in Court, and other events having been established on the record as follows:

1. On January 7, 1975, defendants took the depositions of plaintiff and Perry Margoles (plaintiff's son who had acted on behalf of Dr. Margoles in matters herein involved) pursuant to agreement of plaintiff's counsel that the deponents would appear and produce certain specified documents which had been requested by defendants in writing. Some, but not all, of the documents were produced and it was agreed that other documents would be produced thereafter.

2. On January 9, 1975, plaintiff's counsel sent some additional documents to defense counsel stating in his letter that as soon as he had "the other documents which you requested," he would contact defendants' counsel. No further documents were sent by plaintiff at that time, notwithstanding another written request by defense counsel on February 6, 1975.

3. On April 25, 1975, at a pretrial conference attended by respective counsel, the plaintiff, and Perry Margoles, the trial was scheduled for September 22, 1975, plaintiff's counsel agreed to produce the remaining documents, and, thereafter, in its written summation to counsel, the Court reminded plaintiff of that agreement. On April 28, 1975, defense counsel wrote to plaintiff's counsel again itemizing documents to be produced.

4. No further documents were produced by plaintiff until shortly before what was to have been the final pretrial conference

on August 15, 1975. On August 11, plaintiff's counsel advised defense counsel in writing that Perry Margoles should appear at defense counsel's office on August 12, 1975, and produce for inspection and copying "those documents which you requested us to produce as set forth in your letter of April 28, 1975." Perry Margoles arrived on August 14, 1975, with some, but not all, of the requested documents.

5. At the pretrial conference on August 15, 1975, attended by counsel, plaintiff and his son, plaintiff requested that the trial be adjourned because of other matters in which he was involved, including problems and litigation respecting a hospital building in Milwaukee. The trial date was adjourned to January 12, 1976. There was further discussion concerning the documents which had not yet been produced by plaintiff and, again, it was agreed that they would be produced. The Court ordered production by September 6 so as to permit ample time for defendants to review the documents to be produced and make final preparation for trial; at the request of plaintiff's counsel, that date was extended to September 19, 1975. In its written summation to counsel dated August 19, 1975, the Court again specified that the documents previously ordered to be produced by the April 29 letter of the Court were to be produced by plaintiff by September 19, 1975.

6. On October 23, 1975, defendants moved, pursuant to Rule 37 (b) (2) (C), Federal Rules of Civil Procedure, that the action be dismissed on the ground that the plaintiff had again failed to produce the requested documents which had been ordered produced by September 19, supporting their motion with affidavits and a brief. Plaintiff made no response until late in the

afternoon of November 10, when plaintiff's counsel made a telephone call to defendants' counsel, consummated the next day.

7. On November 12, 1975, the time for plaintiff to file a brief having expired, counsel for plaintiff wrote the Court, advising that defense counsel had agreed they would not insist that his lateness in filing an answering memorandum in opposition to the motion constituted a waiver of the right to do so (such waiver being prescribed in Section 6.01, Rules of the District Court), and stating that his memorandum and materials thereof would be mailed no later than November 17, 1975. A brief and a supporting affidavit were so filed by plaintiff and, thereafter, defendants filed a reply brief and affidavit.

8. On December 1, 1975, plaintiff's counsel wrote the Court, advising that the previously undelivered documents had been delivered to defense counsel on November 24, 1975. He specified as having been included, among other things, the "Day-Timers" of Perry Margoles for the years 1970-1972 and correspondence involving the office of Representative McClory or persons connected with that office. (The persons to whom the slanders alleged herein were allegedly communicated were persons in Mr. McClory's office.) Each of these categories describes documents which had previously been specifically requested, which plaintiff had earlier agreed to produce, and which, under order of the Court, were to have been produced by September 19.

Defendants also had advised the Court of this production in their reply brief filed November 28, 1975. They stated, as examples, that the papers in the November 24 production

included: previously non-produced correspondence between Perry Margoles and Mr. McClory and persons on his staff, including a two-and-a-fraction page letter relating to the subject matter of the suit from Perry Margoles to Mr. Schiff prior to Mr. Schiff's deposition in this case, notes disclosing use of the "Alida Johns memo" for plaintiff's benefit in 1971; previously non-produced "Day-Timers" containg a substantial number of relevant and material references, and disclosures of other communications with the McClory staff not previously specified.

In their reply brief, and their letter of December 3, 1975, to the Court (in reply to the December 1 letter of plaintiff's counsel), defendants advised the Court that, in view of the documents produced on November 24, they would if the trial were to proceed, need to take additional discovery and make additional trial preparations on relevant subjects which had already been the subject of previous deposition testimony. (They informed the Court that they could not complete that new preparation in the time remaining before the scheduled trial date.) They advised that they had accepted the production of documents on November 24 without prejudice to their motion, and had so advised plaintiff's counsel.

9. On January 5, 1976, the final pretrial conference was held, attended by respective counsel. No pretrial report was filed, nor had one been filed in advance of the conference, as previously ordered by the Court. Plaintiff's counsel then moved that the scheduled trial date of January 12, 1976, be vacated and rescheduled in early April, 1976, on the ground that the plaintiff, Dr. Margoles, had become ill "on or about December 9, 1975," and would not be able to appear for trial on January 12, 1976. No previous notice thereof had been given to the Court; defense counsel had not been advised thereof

until Friday, January 2, 1976.

10. The Court then heard oral argument from counsel concerning the pending motions;

AND, on the basis of all the pleadings and proceedings herein, and the motions and affidavits herein filed, the Court, being fully advised in the premises, and having found and hereby finding that the plaintiff failed to produce for defendants relevant and material documents in his possession or subject to his control, in disobedience of orders of the Court to provide discovery; that plaintiff is responsible for the case not being in the state of readiness for trial ordered in the pretrial order of the Court; that the failure of the plaintiff to obey the orders for discovery was willful, was prejudicial to the defendants, and was prejudicial to the administration of the Court, the Court having scheduled the case for trial on a day certain; that the untimely production of the documents subsequent to defendants' motion did not cure the default; and the Court having rendered its oral opinion and ruled on January 5 that the case be dismissed and the plaintiff's motion for continuance be denied; NOW, THEREFORE,

IT IS HEREBY ORDERED that the above entitled action be and it hereby is dismissed pursuant to Rule 37 (b) (2) (C), Federal Rules of Civil Procedure, on the grounds and for the reasons above set forth and as set forth in the oral opinion of the Court, with taxable costs to the defendants; and

IT IS HEREBY FURTHER ORDERED, in view of the foregoing, that the plaintiff's motion for continuance by denied.

Dated at Milwaukee, Wisconsin, this 8th day of January, 1976.

BY THE COURT:

/s/ Robert W. Warren
United States District Judge

(ORDER DENYING MOTION TO VACATE JUDGMENT)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

DR. MILTON MARGOLES, M.D.,
Plaintiff,

vs.

ALIDA JOHNS AND
THE JOURNAL COMPANY,
a corporation,
Defendants.

Case No. 72-C-470

MEMORANDUM and ORDER

On January 8, 1976, this Court entered an order and judgment dismissing the action named above pursuant to Rule 37 (b) (2) (C) of the Federal Rules of Civil Procedure. On February 4, 1976, counsel for the plaintiff filed both a notice of appeal of the order of dismissal and a motion to set aside the judgment pursuant to Rule 60 (b) of the Federal Rules of Civil Procedure. For the reasons set out in the following memorandum opinion, the Court must conclude that no relief from the judgment or order of dismissal is warranted.

I

Despite the fact that a notice of appeal has been filed, the Court is of the opinion that it retains sufficient jurisdiction to deny the pending motion. *See: Binks Manufacturing Co. v. Ransburg Electro-Coating Corp,*

281 F.2d 252, 260-61 (7th Cir., 1960), *cert. dismissed*, 366 U.S. 211 (1961), as cited in *Sears, Sucsy & Co. v. Insurance Company of North America*, 392 F.Supp. 398, 406 (N.D. Ill., 1975). Because said motion was not filed within ten days after entry of judgment, it cannot be considered as a motion to alter or amend judgment to Rule 59 (e) of the Federal Rules of Civil Procedure. *Compare: Chrysler Corp. v. Lakeshore Commercial Finance Corp.*, 66 F.R.D. 607 (E.D. Wis., 1975).

II

The Court has reviewed the written record compiled in connection with the motion to dismiss this action, the transcript of the oral argument presented to the Court on January 5, 1976, and the various briefs and affidavits submitted in support of and in opposition to the post-judgment motion now at issue; this review reveals that the arguments contained in each set of documents are substantially identical. In light of this circumstance, the Court can find no reason to alter the order of dismissal that has been entered. The Court would therefore exercise its sound discretion to deny the motion for relief from judgment at this time. *See generally*, 11 Wright & Miller, Federal Practice and Procedure: Civil S. 2857 *et seq.* (1973 ed.).

The Court is of the opinion that, as evidenced in the rather lengthy order of dismissal, the facts of this case demonstrate failures to comply with clear and repeated discovery orders on the part of the plaintiff and/or his agents and/or attorneys, all to the substantial prejudice of the defendants and their counsel and the administration of this Court. It seems apparent that these failures were done either wilfully or in conscious disregard of this Court's specific decrees;

thus there was ample justification for an entry of an order of dismissal pursuant to Rule 37 (b) (2) (C). *See:* 4A Moore's Federal Practice S. 37.03(2.-5) (1975 ed.).

As an aside, the Court might note that regardless of the propriety of an order of dismissal under Rule 37, the conduct of the prosecution of this action seems sufficiently dilatory to justify dismissal pursuant to Rule 10.03 of the Rules of the United States District Court for the Eastern District of Wisconsin.[1]

While another hearing on these matters has been requested, the Court finds that no additional oral argument or testimony would be appropriate.

III

For the reasons set out in the preceding portions of this opinion,

THE COURT FINDS that, despite the fact that a notice of appeal has been filed, jurisdiction exists to permit some limited action on the part of this Court at this time;

THE COURT THEREFORE ORDERS that the motion for relief from judgment, filed on behalf of the plaintiff pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, must be and is hereby DENIED.

SO ORDERED this 15th day of March, 1976, at Milwaukee, Wisconsin.

/s/ Robert W. Warren
United States District Judge

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1. Rule 10.03 of the Rules of the United States District Court for the Eastern District of Wisconsin reads as follows: "Section 10.03 Lack of Diligence. Whenever it appears to the judge in charge of a case that the plaintiff is not diligently prosecuting the action the judge may enter an order of dismissal with or without prejudice after 20 days' written notice to the parties."